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No. 92-317

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

CARLOS C. VICARIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government's filing of a timely notice of appeal from the district court's new trial order divested the district court of jurisdiction to commence retrial proceedings against petitioner.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Apostol v. *Gallion*, 870 F.2d 1335 (7th Cir. 1989)	5, 6
Berman v. *United States*, 302 U.S. 211 (1937)	5
Griggs v. *Provident Consumer Discount Co.*, 459 U.S. 56 (1982)	4-5
Marrese v. *American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985)	5
Shewchun v. *United States*, 797 F.2d 941 (11th Cir. 1986)	5
United States v. *Brown*, 926 F.2d 779 (8th Cir. 1991)	7-8
United States v. *Byrski*, 854 F.2d 955 (7th Cir. 1988)	7
United States v. *Cox*, 475 F.2d 837 (9th Cir. 1973)	8, 9
United States v. *Cronic*, 466 U.S. 648 (1984)	6
United States v. *Davis*, 856 F.2d 1514 (11th Cir. 1988)	5
United States v. *DiBernardo*, 880 F.2d 1216 (11th Cir. 1989)	6-7
United States v. *Distasio*, 820 F.2d 20 (1st Cir. 1987)	5
United States v. *Drefke*, 707 F.2d 978 (8th Cir.), cert. denied, 464 U.S. 942 (1983)	6
United States v. *Dunbar*, 611 F.2d 985 (5th Cir.), cert. denied, 447 U.S. 926 (1980)	6, 7
United States v. *Emens*, 565 F.2d 1142 (9th Cir. 1977)	9
United States v. *Farmer*, 923 F.2d 1557 (11th Cir. 1991)	7
United States v. *Gatto*, 763 F.2d 1040 (9th Cir. 1985)	8, 9, 10
United States v. *Goodwin*, 770 F.2d 631 (7th Cir. 1985), cert. denied, 474 U.S. 1084 (1986)	7

Cases—Continued: Page

United States v. *Grabinski*, 674 F.2d 677 (8th Cir.), cert. denied, 459 U.S. 829 (1982) 7
United States v. *Green*, 882 F.2d 999 (5th Cir. 1989) 5, 7
United States v. *Hitchmon*, 602 F.2d 689 (5th Cir. 1979) 5-6, 7, 8
United States v. *Joseph*, 914 F.2d 780 (6th Cir. 1990) 5
United States v. *Katsougrakis*, 715 F.2d 760 (2d Cir. 1983), cert. denied, 464 U.S. 1040 (1984) 6
United States v. *Khoury*, 901 F.2d 975 (11th Cir. 1990) ... 6
United States v. *Palmer*, 766 F.2d 1441 (10th Cir. 1985) . 7
United States v. *Prows*, 888 F.2d 100 (11th Cir. 1989) 5
United States v. *Queen*, 847 F.2d 346 (7th Cir. 1988) 5
United States v. *Salerno*, 868 F.2d 524 (2d Cir.), cert. denied, 491 U.S. 907 (1989) 5, 7
Wilson v. *O'Leary*, 895 F.2d 378 (7th Cir. 1990) 5, 6

Constitution, statutes and rules:

U.S. Const. Amend. VI 9
18 U.S.C. 3731 ..... 3, 8
21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2
21 U.S.C. 952(a) 2
21 U.S.C. 963 2
Fed. R. App. P. 4(b) 3
Fed. R. Crim. P.:
Rule 33 6
Rule 36 6
Rule 48(b) 9

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 963 F.2d 1412.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1992. The petition for a writ of certiorari was filed on August 17, 1992 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiring to import cocaine,

in violation of 21 U.S.C. 963; conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; importing cocaine, in violation of 21 U.S.C. 952(a); and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). A week after the verdict, on December 18, 1991, petitioner filed motions for a new trial and a judgment of acquittal. The district court held a hearing on the motions on March 9, 1992, and orally granted the motion for a new trial at that time.[1] An entry memorializing the grant of the new trial motion was recorded on the court's docket that same day. Pet. App. 2.

In a subsequent order dated March 19, the district court reduced to writing its order granting a new trial. The government filed a motion for reconsideration of the order on March 23. Forty-two minutes after the government's motion for reconsideration was docketed, the district court's March 19 written order granting the new trial was also entered in the docket. On April 6, petitioner filed a response to the reconsideration motion, and the government filed a notice of supplemental authority on May 5. Pet. App. 2.

On May 11, in response to the government's request for a ruling on its pending motion for reconsideration, the district court entered a written order finding that the reconsideration motion had been filed prematurely because it was docketed 42 minutes before the new trial order was docketed. The district

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[1] The basis for the new trial order was the district court's failure to give an entrapment instruction. Mar. 9, 1992, Tr. 9-18.

court held that, in those circumstances, its March 19 written order granting a new trial was tantamount to a denial of the March 23 motion for reconsideration. The court then ordered that the second trial commence at once. Pet. App. 2-3.

The government immediately filed a notice of appeal pursuant to 18 U.S.C. 3731, and an emergency motion to stay the retrial. The district court expressed the view that the notice of appeal was untimely because more than 30 days had elapsed since its order granting a new trial was docketed on March 23. The court refused to delay the trial and immediately impaneled a jury. That same day, May 11, the court of appeals granted a temporary stay of the trial. Pet. App. 3, 10-13.

2. On May 18, following briefing by both parties of the jurisdictional issue, the court of appeals granted the government's motion to stay proceedings in the district court pending the disposition of the government's appeal of the new trial order. Pet. App. 1-9. The court first rejected petitioner's claim that the government's March 23 reconsideration motion was ineffectual because it was filed minutes before the March 19 written order granting a new trial was docketed. The court relied on Rule 4(b), Fed.R.App. P., which provides that a "notice of appeal filed after the announcement of a[n] * * * order but *before* entry of the * * * order *shall be treated as filed after such entry and on the day thereof.*" Pet. App. 5. Accordingly, the court of appeals concluded that, "under the express terms of Fed. R. App. P. 4(b), the government was entitled to file a notice of appeal from the district court's grant of [petitioner's] motion for a

new trial or to file a motion for reconsideration directed at that ruling as soon as the district court announced it." *Id.* at 6.

Because the government's March 23 reconsideration motion was filed within 30 days of the district court's March 9 announcement of the order granting the new trial motion, the court held that it tolled the time for filing a notice of appeal. The court of appeals further held that the district court did not deny the reconsideration motion until May 11 (when it issued its order erroneously stating that it had denied the motion in its March 19 order), and that the government timely filed its notice of appeal within 30 days of that date. Pet. App. 6-8.

The court then held that the timely filing of a notice of appeal divested the district court of jurisdiction before it impaneled the jury. The court accordingly granted the government's motion to stay any proceedings in the district court pending resolution of the government's appeal. Pet. App. 8-9.

ARGUMENT

Petitioner argues (Pet. 5-8) that the filing of the government's notice of appeal did not divest the district court of jurisdiction to proceed with the retrial.[2] That claim is without merit and does not warrant review by this Court.

1. With limited exceptions, the filing of a notice of appeal divests the district court of jurisdiction over those aspects of the case involved in the appeal. *Griggs* v. *Provident Consumer Discount Co.*, 459

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[2] Petitioner does not challenge the court of appeals' ruling that the government's notice of appeal was timely filed.

U.S. 56, 58 (1982) (per curiam). See also *Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985); *Berman* v. *United States*, 302 U.S. 211, 214 (1937); *Wilson* v. *O'Leary*, 895 F.2d 378, 382 (7th Cir. 1990); *United States* v. *Prows*, 888 F.2d 100, 101 (11th Cir. 1989); *United States* v. *Davis*, 856 F.2d 1514, 1516 n.5 (11th Cir. 1988); *United States* v. *Queen*, 847 F.2d 346, 350 (7th Cir. 1988); *United States* v. *Distasio*, 820 F.2d 20, 23 (1st Cir. 1987); *Shewchun* v. *United States*, 797 F.2d 941, 942 (11th Cir. 1986). This general rule is premised on the unremarkable proposition that two courts "should not attempt to assert jurisdiction over a case simultaneously" (*Griggs*, 459 U.S. at 58), and serves to avoid the confusion and waste of time that would result from dual jurisdiction. *Apostol* v. *Gallion*, 870 F.2d 1335, 1337 (7th Cir. 1989); *United States* v. *Salerno*, 868 F.2d 524, 540 (2d Cir.), cert. denied, 491 U.S. 907 (1989); *Shewchun* v. *United States*, 797 F.2d at 943. The general rule is also premised on "considerations of fairness to parties who might otherwise be forced, as a matter of tactics, to fight a 'two front war' for no good reason." *Ibid.*

There are exceptions to the general rule that a case may be in only one court at a time. Thus, it is settled that during the pendency of an appeal the district court retains jurisdiction to proceed with matters in aid of the appeal. *Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U.S. at 379; *United States* v. *Joseph*, 914 F.2d 780, 783 n.2 (6th Cir. 1990); *United States* v. *Green*, 882 F.2d 999, 1001 (5th Cir. 1989); *Shewchun* v. *United States*, 797 F.2d at 942; *United States* v. *Hitchmon*, 602 F.2d 689, 692 (5th Cir. 1979)

(en banc). The district court also retains jurisdiction "over questions not presented by the appeal and may take steps that do not present risks of duplicative action." *Wilson* v. *O'Leary*, 895 F.2d at 382 (during pendency of appeal district court may dispose of a request for a certificate of probable cause); *Apostol* v. *Gallion*, 870 F.2d at 1338; *United States* v. *Katsougrakis*, 715 F.2d 769, 776 n.7 (2d Cir. 1983), cert. denied, 464 U.S. 1040 (1984) (district court retains jurisdiction during pendency of appeal to impose sanctions for violation of a post-conviction release condition); *United States* v. *Drefke*, 707 F.2d 978, 984 (8th Cir.) (per curiam), cert. denied, 464 U.S. 942 (1983) (district court retains jurisdiction during pendency of appeal to enforce its own judgment concerning a defendant's release status); *United States* v. *Dunbar*, 611 F.2d 985, 989 (5th Cir.) ("[a]fter the filing of a notice of appeal, the trial court retains jurisdiction to modify or grant an injunction pending appeal, to act with regard to appeal and supersedeas bonds, and to aid execution of a judgment that has not been superseded"), cert. denied, 447 U.S. 926 (1980); Fed. R. Crim. P. 36 (district court may correct clerical errors in record at any time).

Similarly, under Fed. R. Crim. P. 33, the district court may consider a motion for a new trial during the pendency of an appeal and either deny the motion or certify to the court of appeals that it would grant the motion on remand. Such limited jurisdiction does not present any risk of duplicative action, and in fact aids the efficient disposition of cases. *United States* v. *Cronic*, 466 U.S. 648, 667 n.42 (1984); *United States* v. *Khoury*, 901 F.2d 975, 976 (11th Cir. 1990); *United*

States v. *DiBernardo*, 880 F.2d 1216, 1224 (11th Cir. 1989); *United States* v. *Goodwin*, 770 F.2d 631, 639 n.3 (7th Cir. 1985), cert. denied, 474 U.S. 1084 (1986); *United States* v. *Palmer*, 766 F.2d 1441, 1445 (10th Cir. 1985).

The courts have also carved out two narrow exceptions allowing a district court to proceed to trial even after a notice of appeal has been filed. Thus, it is settled that when a defendant takes an interlocutory appeal from an order denying his motion to dismiss on double jeopardy grounds, the district court may proceed with the trial if it finds that the appeal is frivolous. *United States* v. *Brown*, 926 F.2d 779, 781 (8th Cir. 1991); *United States* v. *Salerno*, 868 F.2d at 539 (citing cases); *United States* v. *Byrski*, 854 F.2d 955, 956 n.1 (7th Cir. 1988); *United States* v. *Grabinski*, 674 F.2d 677, 679 (8th Cir.) (en banc) (per curiam), cert. denied, 459 U.S. 829 (1982); *United States* v. *Farmer*, 923 F.2d 1557, 1565 (11th Cir. 1991); *United States* v. *Dunbar*, 611 F.2d at 988.[3] Similarly, the district court retains jurisdiction to proceed with the merits of the case if a defendant takes an interlocutory appeal from an unappealable order. *United States* v. *Green*, 882 F.2d at 1001; *United States* v. *Hitchmon*, 602 F.2d at 691, 694. The courts have reasoned that to divest the district court of jurisdiction to proceed in those two instances would render the district courts powerless to prevent intentional "dilatory tactics." *United States* v. *Grabinski*, 674 F.2d at 679. See also *United States* v. *Brown*, 926

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[3] In that situation, the appellate court can grant a stay of the trial if it regards the appeal as non-frivolous. *United States* v. *Dunbar*, 611 F.2d at 988-989.

F.2d at 781; *United States* v. *Hitchmon*, 602 F.2d at 694.

Petitioner's case does not fall within any of the exceptions to the general rule. Petitioner was tried and convicted. After the district court granted a motion for a new trial, the government filed a timely notice of appeal. The government's appeal is not a dilatory tactic—the government seeks, as 18 U.S.C. 3731 authorizes, to preserve the jury's verdict and avoid an unnecessary second trial. Nor does the court's retrial order aid the court of appeals in any way. And if the court of appeals should hold that petitioner's motion for a new trial was granted improperly, a retrial would be a wasted effort. It is true that the government's appeal will delay a second trial, should one be required. But there is no apparent basis for petitioner's suggestion that his speedy trial rights are implicated by the government's appeal and the court of appeals' stay order. Even if there is some basis for such a claim, petitioner can advance it after the completion of the proceedings in the court of appeals. The issue before this Court is whether the district court retained jurisdiction to proceed with a second trial after the government had appealed from an order granting a retrial.

2. Petitioner argues that the ruling below conflicts with the decisions of the Ninth Circuit in *United States* v. *Gatto*, 763 F.2d 1040 (1985), and *United States* v. *Cox*, 475 F.2d 837 (1973). There is no conflict between the decision below and the Ninth Circuit's decisions in those cases.

In *Cox*, the district court granted a pretrial motion to suppress government evidence, and the government filed a timely notice of appeal from the order. While the appeal was pending, the district court granted the defendant's motion to dismiss the indictment, out of concern that the delay occasioned by the appeal might violate the defendant's Sixth Amendment speedy trial rights. The court of appeals upheld the suppression order. Then, after stating only that "given the circumstances of this case, we do not feel the district court erred," the court summarily affirmed the dismissal order. 475 F.2d at 841.

In *Gatto*, the district court entered a pretrial order suppressing government evidence. The government took an immediate appeal from the order, and unsuccessfully sought to stay commencement of the trial. On the day trial was to begin, the government refused to proceed, and the district court dismissed the indictment with prejudice pursuant to Fed. R. Crim. P. 48(b), based on unnecessary delay in bringing the defendant to trial. On appeal, the court reversed both the suppression and dismissal orders. The court rejected the government's contention, however, that the district court lost jurisdiction over the action once the government filed its notice of appeal to challenge the suppression order. Citing *United States* v. *Emens*, 565 F.2d 1142, 1144 (9th Cir. 1977), and *Cox*, 475 F.2d at 841, the court held that "a district court retains 'the naked power, in appropriate cases, to dismiss an indictment' while a section 3731 appeal from a pretrial order is pending." 763 F.2d at 1049. The court found, however, that the district court had abused its discretion by dismissing the

indictment because the delay was necessary to protect the government's right to appeal the suppression of substantially material evidence. 763 F.2d at 1050.

While we disagree with the Ninth Circuit's conclusion that a district court retains jurisdiction to dismiss an indictment after the government has filed a notice of appeal from a suppression order, *Cox* and *Gatto* do not aid petitioner. The district court in this case did not dismiss the indictment on the ground that the time required for disposition of the appeal would infringe petitioner's speedy trial rights. Rather, the district court granted petitioner's motion for a new trial and attempted to proceed with the retrial. Nothing in *Cox* or *Gatto* suggests that the district court retains jurisdiction to proceed with a retrial, as the court of appeals below recognized by distinguishing those cases. Pet. App. 8 n.2.

Moreover, the holding in *Gatto* that the district court possessed jurisdiction to dismiss an indictment should be of limited practical importance, since the Ninth Circuit went on to hold that the district court abused its discretion by dismissing the indictment. Thus, even if the Ninth Circuit were to hold that a district court had the "naked power" to proceed with a retrial, it would be an abuse of discretion under *Gatto* for the district court to go forward with a retrial while the government's appeal was pending, since a retrial could result in wasted effort.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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